REVEEX INTERNATIONAL, S.A.

v.

MACLAINE WATSON TRADING (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 1355 OF 1980]
21 FEBRUARY 1991

CIVIL PROCEDURE: *Counterclaim - Right of defendant to include claim for goods contained in earlier consignment - Rules of the High Court 1980, O. 15 r. 2(1).*

SALE OF GOODS: *Merchantable quality - Breach of condition - Effect of - Implied condition - Breach of warranty - Whether defendants are to provide plaintiff with information on defective goods - Condition precedent - Sales of Good Act, s. 16.*

In 1979, the defendants, a Malaysian company, M, placed a number of orders for various pharmaceutical veterinary products from the plaintiffs, R, a Spanish company. These products were delivered in eight consignments and the agreed purchase price for the last consignment was to be by as Bill of Exchange; M did not honour the Bill of Exchange.

R claimed as holders in due course of the bill and obtained judgment against M; this is a counterclaim by M.

Judgment was entered against the defendants. The defendants however counterclaimed against the plaintiff.

The main contention of M was that the consignments were not reasonably fit for the purpose for which they were intended and were not merchantable; therefore breaching a condition of the contract as statutorily implied by s. 16 of the Sale of Goods Act 1957 (the Act).

R contended that since their claim had been in relation to the last consignment, a counterclaim based on lack of merchantability of goods contained in the earlier consignment was not tenable.

Held:

[1] Under O. 15 r. 2(1) of the Rules of the High Court 1980 it is sufficient as long as the defendant alleges a claim on any matter, wherever amd howsoever arising and is not restricted to matters related or connected to the original subject matter of the claim against the defendant.

[2] Although C, a pharmacist employed with M, in her evidence, had referred to and identified a substantial amount of various drugs which she thought might spoil in a matter of months or before the two year expiry period, there was no evidence to corroborate that this actually happened as C left M's employ in December 1980.

[3] C's records are those contemporaneously made by an expert and were in effect unchallenged or challenged without any effect; her evidence in respect of the sales of the defective products being sold as defective products at discounted prices was accepted. The fact that some of the drugs suggested by her to be unsaleable had been sold does not prove her wrong.

[4] On the evidence it cannot be said that the contention that some of the goods were substandard was an afterthought or frivolously made or that it was made after a period of inordinate delay.

[5] There is no requirement in the law that M must provide R with the particulars of the defective products as a condition precedent to invoking breach of s. 16 as a defence or counterclaim. The provision of such particulars would only be relevant when there were allegations of *mala fides* on the part of the defendant.

[6] On the facts of this case, although there was a lack of contemporaneous provision of detailed information to R about the alleged defects and deterioration of some of the products, the evidence of the contemporaneous notes made by C and arranged by her secretary eliminated any suspicion of lack of *bona fide* that may have arisen.

[Undisputed claims allowed; judgment for defendants for goods totally unsaleable at time of delivery]

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 2(1)
Sale of Goods (Malaya State) Ordinance 1957, s. 16

Other source referred to:
Halsbury's Vol. 41 paras. 681, 682, 883

For the plaintiffs - J.A. Yeoh, (C.K. Ong with him); M/s. Ng. & Ong
For the defendants - James Puthucheary; M/s. Skrine & Co.

JUDGMENT

VC George J:

The plaintiffs, a Spanish corporation, are manufacturers of pharmaceutical products for veterinary use. The defendants, a Malaysian company, *inter alia* trade in such veterinary pharmaceutical products supplying retailers as well as the farmer consumers. During the period from early 1979 to October 1979 the defendants placed a number of orders for various veterinary products with the plaintiffs which were delivered in 8 consignments the last of which was pursuant to an order placed on 3 October 1979 which shipment arrived on 24 February 1980. The agreed purchase price of this last consignment was US$173,781.40 payment of which was to be by Bill of Exchange (as was the mode of payment for the earlier orders and consignments). Each of the earlier Bills of Exchange (as was the mode of payment for the earlier orders and consignments). Each of the earlier bills were duly honoured.

The last bill was due and payable on 28 April 1980. It was dishonoured. It was duly protested for non-payment. The plaintiffs claimed to be holders in due course of the bill and by this action sued the defendants for the Malaysian ringgit equivalent of the value of the said bill and for interest thereon at 8% per annum from 28 April 1980 to date of payment, as well as for the costs of protesting the bill and for party and party costs.

Eventually judgment as prayed was entered against the defendants. However the defendants had counterclaimed for an amount substantially in excess of the plaintiff' claim. There was a trial of the counterclaim and this judgment is in respect of the counterclaim.

In the counterclaim the defendants start off by contending that there was a partial failure of consideration for the bill but go on to contend that substantial portions of the pharmaceutical products not only in the last consignment but in each of the earlier consignments were not reasonably fit for the purpose they were intended and were not merchantable which from the way the trial went was the real cause of action relied on. The defendants go on to plead in the counterclaim that of the goods delivered by the eight shipments:

(i) goods to the value of US$137,746.05 were totally unsaleable at the time of delivery;

(ii) goods to the value of US$126,690.86 which were delivered in apparent good order and condition deteriorated more rapidly than they should have done in the case of products of this kind and became totally unsaleable;

(iii) goods to the value of US$75,320.87 were delivered in a condition where they were capable of being sold but only at a price substantially below the normal selling price and were sold at such reduced price;

(iv) goods to the value of US$33,896.04 were delivered in apparent good order and condition but deteriorated more rapidly after delivery than they should have done to the extent that it is no longer possible to sell them at the usual prices and it is necessary to sell them at substantially reduced prices.

Further the defendants contended that some US$125,577.80 worth of goods supplied were not ordered. The counterclaim under this head was however not pursued with. There was a claim for US$2,936.83 as publicity and advertising allowances. This claim was not disputed by the plaintiffs. Similarly a claim for US$14,288.15 for returned goods and another for US$14,752.24 being certain freight charges said to have been incurred and was payable by the plaintiffs to the defendants were also not disputed.

Finally there was an item by way of counterclaim of US$68,747.51 claimed as agency commission at what was pleaded to be "the customary rate which is 10% of the value of the goods" which claim was disputed.

The defendants should be entitled to judgment in respect of the 3 undisputed items. The claim in respect of the items not pursued with should be dismissed.

As to the claim for agency commission, the defendants relied on the first document in the agreed bundle AB which is a letter from the plaintiffs to the defendants in which they say that they have decided to appoint the defendants as a sales agent for the countries of Asia specified in the letter and that the defendants would be "covered with a rate of over-riding commission as advised by him" which in the context has obvious reference to one Chua Boon Swee.

The only witness for the defendants who touched on the claim for agency commission conceded that Chua Boon Swee had not advised on the rate of commission. Presumably to get round that, an attempt was made to suggest that there was a customary rate as has been seen in the portion of the pleading that was reproduced. However no attempt was made to prove either a custom to pay commission or any customary rate. The claim for agency commission fails.

What is left is the counterclaim based on the alleged breach of the implied condition as to quality or fitness of the goods, that is, the alleged lack of merchantability which is a condition of the contract for the sale of the goods statutorily implied by s. 16 of the Sale of Goods (Malay States) Ordinance 1957.

One of the submissions put forward on behalf of the plaintiffs was that since the plaintiffs' claim was on the Bill of Exchange in respect of the last consignment or shipment, a counterclaim based on lack of merchantability of goods contained in the earlier consignments was not tenable. It is not necessary to go beyond looking at O. 15 r. 2(1) RHC to hold, as I do, that there is no merit in that contention. The rule provides that:

a defendant who alleges he has any claim...against a plaintiff in the action in respect of any matter (wherever and however arising) may, instead of bringing a separate action make a counterclaim in respect of that matter.

It is "any matter (wherever and howsoever arising)" and is not restricted, for example, to matters related or connected to the original subject matter of the claim against the defendant.

The defendants called 4 witnesses. The plaintiffs did not call any witness. They chose to rely on the agreed bundle of documents and on the testimony of the defendants' witnesses who were cross-examined.

The first witness of the defendants was Ms. Christina Ooi Lay Keong, a pharmacist who had been employed by the defendants from March 1979 to December 1980, that is, during most of the relevant period. She said that as and when the consignments from the plaintiffs arrived at the defendants' warehouse, she, accompanied by her secretary and the storekeeper, would subject samples of each type of the goods to a physical examination.

The goods were various kinds of drugs for veterinary use. Some were pre-mixes in powder form which apparently should be free flowing so that it could be evenly and effectively mixed with animal feed. Some of the drugs were in vials, others in bottles with pumps attached to the bottles. Some of the drugs were antibiotic injectables. Ms. Christina Ooi testified that she found some of the goods in each of the shipments were defective. Premixes had hardened. It was according to her beyond a case of being free flowing - some of the premixes were not and had hardened into a lump in their bags. In some of the vials the liquid drugs had crystalised - heavy precipitates could, she said, be seen with the naked eye. She found, for example, that 500 vials of *sultrimutina* injections had crystalised which quantum apparently startled her. She testified that the whole of one consignment of the antibiotics *anti-diarex* which contains tetracycline was in such an unstable state that it had broken down into a dark brown product. The problem apparently was that the *anti-diarex* was in bottles with pumps attached to the bottles with pump heads leaked which caused the breakdown of the tetracycline. Because of the leakage, Ms. Ooi testified that the *anti-diarex* which is classified as a poison could not be stored or transported. Similarly, according to this witness, the syringes in which the antibiotic *mastiveex* was sold leaked and the containers in which the drug *coccirex* was packed "cracked". Another complaint that Ms. Ooi had was that many of the injectables were not labelled with date of manufacture or with the date of its shelf life which, she said, made it unethical for the defendants to sell them.

Ms. Ooi testified that she kept contemporaneous records in respect of particulars of the goods that she found were unsatisfactory. She produced her own handwritten notes (put in as part of the agreed bundle) and mercifully her secretary's typed transcript of her notes arranged in orderly columns was available and produced. The 7 pages of the transcript were marked as an agreed document AB303 to 309.

In AB 303 to AB 306 Ms Ooi and her secretary set out in respect of the drugs examined by Ms. Ooi, in one column "defects detected on arrival into our store", in another column "Products that was (*sic*) spoilt in a matter of weeks", and in a last column "Products which shows strong indication that it may spoil in a matter of months or before the required 2 years expiry period is over." Each of the defective products as found by Ms. Ooi were dealt with in terms of the said 3 columns with the quantity involved and value of the quantity in Malaysian ringgit, set out in the relevant column. The total value arrived at by Ms. Ooi for items in the "defects detected on arrival" column was RM45,886. Products "spoilt in a matter of weeks" was valued at RM334,706.42 to give a total for these two columns of RM380,592.42.

Products that she thought would be spoilt before the 2-year expiry date was valued at RM270,081.35. Apparently the valuation arrived at was based on the invoice price of the goods.

In AB307 and AB308 the format used was different from the earlier pages. In lieu of the 3 columns in the earlier pages, here there was only one, designated "manufacturers' fault."

In AB307 only one drug called *Yodor Veex* was set out, 1105 five litre packs valued at RM33,382.05 which it was stated had cracked containers.

In the page AB308 the only drug referred to was called "Sultrimutina water soluble powder". Again there was the one column "manufacturer's fault". The word "hardened" is there against the drug and also that there was a change of composition of the drug from one shipment to the next "without notifying us and without reducing the cost and causing embarrassment to us". This reduced composition was in 2500 units valued at RM91,725.

AB309 was devoted to certain explanatory notes in respect of the earlier pages.

I pause to note that since the *Yodor Veex* and the *Sultrimutina* water soluble powder do not appear to have been included by Ms. Christina Ooi with those drugs that she had classified under the columns "defects detected on arrival" and "products spoilt in a matter of weeks", it has to be assumed that they do not come under either of those categories. In any event the position in respect of these two drugs is not clear.

Now in each of the pp. AB303 to AB308 there are a number of markings made using a ball pen. They appear to be amendments of Ms. Ooi's records. Ms Ooi testified that such amendments were not made by her and that she did not know who had made them. It turned out that they were made by one En. Lim Kim Boon who testified as the 2nd witness for the defendants.

Soon after having AB303 to 309 prepared Ms. Ooi left the employ of the defendants - in December 1980.

I understand from the 2nd witness En. Lim Kim Boon's testimony that he was an executive with the defendants at all relevant times. He said he was instructed to prepare what he called a status report of all the pharmaceutical products in the defendants' store which he did as on 26 January 1981. He said that he had gone through all the documents available including Ms Ooi's notes and the actual physical stock and prepared a list which was produced as AB374 - 377 which purports to show the updated position of the status of the stock.

En. Lim Kim Boon said that it was based on his study of the stock position as on 26 January 1981, that he had made amendments to Ms. Ooi's records. This he said had to be done because some of the stock referred to in Ms. Ooi's records AB 303 to 309 were in fact sold. All the amendments he said, save one, resulted in a reduction of the amounts given by Ms. Ooi in AB303 to AB309. En. Lim testified that AB374 to AB377 was his list of products that were totally unsaleable at or about the time of delivery. Since he prepared the list well after Ms. Ooi's list was prepared I have to take it that it represents an amalgam of Ms. Ooi's two columns "Defects detected on arrival into our store" and "Products that is spoilt in a matter of weeks" the value of which, as has been seen, was given as RM380,592.42 which at RM2.2140 to one US dollar which was the rate of exchange as at date of the filing of the writ amounts to US$171,902.6287.

The amount En. Lim arrived at in AB374 to AB377 is the lesser amount of US$137,746.05 which at RM2.2140 to the US$ amounts to RM304,969.7547. The difference is consistent with En. Lim's testimony that in fact some of these products treated by Ms. Ooi as unsaleable were after all sold and reductions had to be and were made to the quantum of each of the drugs save one in Ms. Ooi's list set out there as being either defective on arrival or spoilt within weeks of arrival.

Ms Ooi had in the last column in each AB304 to AB306 referred to and identified a substantial amount of various drugs from the plaintiffs that she thought might spoil in a matter of months or before the 2-year expiry period of the drugs. However she left the employ of the plaintiff in December 1980 and could not and in any event did not tell the Court whether her predictions in this respect were proved right.

En. Lim purported to do this in the exercise of preparing his status report of the stock as at 26 January 1981. However he conceded that he was no expert and what he had said about deterioration was what he had been advised by the pharmacist, (presumably not Ms Ooi) who was not called. En. Lim could not say when the alleged deterioration of the drugs took place. His opinion on the defects in or deterioration of the drugs without corroboration, as it were, could not, in my judgment be acceptable. Some samples of the drugs were sent to experts at the Huntingdon Research Centre. Whether these were taken from the drugs already condemned by Ms Ooi or from those that she suspected might eventually deteriorate or spoil is not clear.

In the circumstances I hold that there was insufficient evidence in respect of what in fact happened to the drugs particulars of which are set out in Ms Ooi's last column, that is, of drugs that "may spoil."

The counterclaim in respect of the drugs in that column is setout in the "particulars of counterclaim" under items (a) (ii), (iii) & (iv) and has to be rejected as being insufficiently proven.

Item (a)(i) has reference as I understand it to the amalgam of Ms Ooi's two columns that give the said amount RM380,592.42 but reduced because of sales that had been effected to US$137,746.05 and is claimed as such. Ms Ooi's records are those contemporaneously made by an expert and were in effect unchallenged or challenged without any effect. I accepted her as an unbiased witness of truth. That some of the drugs suggested by her to be unsaleable had in fact been sold does not in my judgment prove her wrong. Her evidence in respect of such sales is that the sale of the defective products was being pushed by the defendants as defective products at discounted prices.

For the plaintiffs it was *inter alia* contended that there was an understanding between the parties that defective and/or spoilt goods were to be returned to the manufacturers. Reference was made to two telexes from plaintiffs to defendants dated 12 November 1979 and 27 November 1979 exhibited in court as AB45 and AB47 respectively.

There is however insufficient evidence to back up any suggestion that there was an agreement binding on the parties to the effect that a claim could only be made on substandard goods if they are sent back and invoiced for in the manner suggested by the defendants.

Section 16 of the Sale of Goods Act provides an implied condition in a contract of sale that the goods shall be of merchantable quality. The breach of a condition express or implied gives a right to treat the contract as repudiated. The breach of a warranty gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated

- *Halsbury's* Vol. 41 paras. 681 and 682. Where there is a breach of a condition the buyer may however elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated - *Halsbury's* Vol. 41 para. 683. When that is done the buyer is entitled to set up against the seller the breach of warranty in diminution or even extinction of the price or maintain an action against the seller for the breach of warranty - *Halsbury's* Vol. 41 para. 883 - which can be by way of a counterclaim - see footnote 7 to the said para 883. And that seems to be what has been done here.

As has been seen, orders for the consignments had been placed from early 1979. The consignments arrived from time to time starting from March 1979. The last consignments arrived on 24 February 1980. There is evidence of complaints having been made. In re-examination, the 2nd witness pointed out to a number of written complaints exhibited in the agreed bundle of documents. Within about 3 months of the arrival of the last shipment the plaintiffs' lawyers telexed their clients' concern about the dishonour of the last bill of exchange. This is AB327 in the agreed bundle. The defendants' solicitors' reply to that telex is AB328 and 329 where *inter alia* notice is given of the possible invocation of the breach of the implied condition provided by the said s. 16. At AB329 it is pointed out that the "Total inventory value under review is approximately US$500,000". At AB 330 it is seen that this allegation of supply of substandard goods is completely rejected.

Clearly the contention that some of the goods were substandard cannot be said to be an afterthought or frivolously made and it cannot be said that it was made after a period of inordinate delay. It is to be noted while the allegations were rejected, a meeting in London to discuss the allegations was suggested by the plaintiffs' agents. This meeting did not appear to have taken place. In August 1980 the plaintiffs were provided with the preliminary report of The Huntingdon Research Centre. In December 1980 the writ herein was caused to be issued. The defendants filed their defence and counterclaim in April 1981 - the defendants chose to set up against the sellers the alleged breach of the s.16 condition as a breach of warranty as the basis for their counterclaim which, as has been seen from the discussions on the subject in *Halsbury's* the defendants are entitled to do. It is to be noted that there appears to have been no inspection by the plaintiffs of the products alleged to have been substandard.

Much was made by Counsel by way of cross-examination and in submission that full particulars of the goods alleged to have been defective were never provided to the plaintiffs. There is no requirement in the law that such provision of particulars is a condition precedent, as it were, to invoking a s. 16 breach as a defence or counterclaim. Not providing such particulars would be relevant where the *bona fide* of the allegations is questioned. In considering and assessing the weight to be given to the evidence of Ms Christina Ooi, I took into consideration the peculiar lack of contemporaneous provision to the plaintiffs of detailed information about the allegations of the products being substandard and of the alleged rapid deterioration of some of the products and concluded that while not providing such detailed information could give rise to suspicion, Ms Ooi's testimony (which as has been seen was accepted as that of a witness of truth) and the evidence of the contemporaneous notes made by her and rearranged by her secretary, did not give rise to any such suspicion of lack of *bona fide* that may have arisen.

Accordingly in my judgment the defendants are entitled to judgment on the counterclaim in the amounts as set out herebelow as against the prayers (a) to (f) of the counterclaim, US dollars converted to Malaysian ringgit at RM2.2140 to the US dollar:

(a) US$137,746.05 equivalent to RM304,969.75
(b) Nil (having been abandoned)
(c) US$2,936.83 equivalent to RM 6,502.14
(d) US$14,288.15 equivalent to RM 31,633.96
(e) US$14,752.74 equivalent to RM 32,662.56
(f) Nil (as being held to be without merit)

Total US$169,723.77 equivalent to RM375,768.41. There will be the judgment for the defendant for the aggregate of the said amounts of RM375,768.41 which amount shall be set off against the judgment sum of RM384,765.30 obtained by the plaintiffs. The defendants will pay interest on the balance amount after the set-off to be calculated from 28 April 1980, until payment at 8% per annum.

The costs of and incidental to the counterclaim as taxed by the proper officer of the Court will be paid by the plaintiffs to the defendants.

Also found at [1991] 2 CLJ 1388